Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter	)	
	)	
Communications Assistance for Law	)	ET Docket No. 04-295
Enforcement Act and Broadband Access	)	
And Services	)	RM-10865

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

Jennifer Byrd
Gary Phillips
Paul K. Mancini

SBC Communications Inc.
1401 Eye Street, NW
Suite 1100
Washington, D.C. 20005
(202) 326-8904 – phone
(202) 408-8745 – facsimile

Its Attorneys

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SBC Communications Inc. and its affiliated companies (collectively, SBC) respectfully submit these reply comments in response to the Commission's Notice of Proposed Rulemaking on the applicability of the Communications Assistance for Law Enforcement Act to broadband services and Voice over Internet Protocol (VoIP) services (*CALEA NPRM*).[1]

I. INTRODUCTION AND SUMMARY

As SBC stated in its Comments to the *CALEA NPRM*, it strongly supports Law Enforcement's[2] ability to perform lawful surveillance activities and will continue to cooperate with Law Enforcement to meet its legitimate surveillance needs. SBC, however, believes that the Commission should take great care to make certain it applies CALEA only in ways consistent with Congressional intent. Although in these reply comments SBC does not express an opinion on the merits of the Commission's tentative conclusion that CALEA should apply to broadband and VoIP services, SBC again strongly urges the Commission to ensure that its analysis will withstand rigorous judicial review before imposing CALEA obligations on these relatively new, growing, and innovative services.

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[1] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676 (2004) ("*CALEA NPRM*").

[2] Except as otherwise indicated in the text, the term Law Enforcement refers to all law enforcement agencies generally, including the FBI and DOJ, as well as state and local law enforcement.

Moreover, SBC believes the Commission went too far in the *CALEA NPRM* by attempting to define CALEA section 103 obligations with respect to broadband and VoIP services. Even the United States Department of Justice (DOJ), whose petition sparked this rulemaking, urges the Commission to defer the technical issues, including section 103 applicability, to the industry standards bodies and the CALEA deficiency process. The Commission should heed that advice.

Furthermore, if the Commission ultimately determines that broadband and VoIP services are subject to CALEA obligations, it must allow the industry ample time to meet those obligations. Providers of broadband and VoIP services have never before been subject to CALEA obligations (although, generally, they have met Law Enforcement's surveillance needs) and should be given adequate opportunity to work together and with standards bodies to develop appropriate standards and implement those standards within a reasonable time period. Along with a reasonable deployment period, the Commission should utilize the existing CALEA extension process to ensure that those companies unable to meet the deadline have an appropriate vehicle to alert the Commission and work toward a solution without the repercussions associated with non-compliance.

Finally, the Commission must not interfere with providers' ability to seek compensation from Law Enforcement. The Omnibus Crime Control and Safe Streets Act of 1968[3] (OCCSSA) established an obligation for Law Enforcement to compensate providers for facilities and assistance provided to Law Enforcement for conducting surveillance activities. CALEA did not undo that obligation and the Commission should not, and indeed cannot, undo it here.

[3] 18 U.S.C. §§2510 et. seq.

II. AS MANY COMMENTERS RECOMMENDED, THE COMMISSION SHOULD SEEK EXTENSIVE INPUT FROM INDUSTRY EXPERTS BEFORE ADDRESSING COMPLEX TECHNICAL ISSUES, SUCH AS THE DEFINITIONS OF CALL IDENTIFYING INFORMATION AND CALL CONTENT

As even the DOJ acknowledges, the Commission may have been overly ambitious by attempting to resolve too many complex issues in the *CALEA NPRM*.[4] The DOJ points to nine technical areas this NPRM attempts to resolve, such as defining call-identifying information, assessing the sufficiency of packet mode standards, and determining the feasibility of using trusted third parties, and notes that each of those nine issues is complex enough to warrant a separate rulemaking.[5] And Verizon observes, "the Commission should leave to the standards process the technical details and definition of data elements."[6] The Telecommunications Industry Association (TIA) further points out that "[i]n enacting CALEA, Congress recognized that industry-led standards development efforts are critical to the cost effective and successful implementation of CALEA…the Commission should reaffirm the central role of the standards process."[7] SBC agrees with the DOJ and other parties that the primary purpose of this rulemaking should be to answer the threshold question of whether CALEA applies to broadband and VoIP services. As SBC stated in its comments, and as echoed by the DOJ, technical questions, especially those involving the application of section 103 to broadband and VoIP services, should be resolved based on thorough input from industry experts.[8] And as SBC further

[4] DOJ Comments at 39-41.

[5] *Id.* at 41.

[6] Verizon Comments 21.

[7] TIA Comments at 9.

[8] SBC Comments at 15. In its comments at 41-42, the DOJ discusses the complexity of the issues that the Commission attempts to resolve in the *CALEA NPRM* and recommends that the Commission resolve technical issues via the deficiency process, should the need arise. The DOJ further states that its approach has been to resolve standards disputes at the standards-drafting level and involve the Commission only where necessary. *See* DOJ Comments at 43.

detailed, there are numerous ways the Commission could establish industry fora or workshops to gain valuable, insightful input from the industry.[9]

The DOJ also recommends that, when defining the terms "industry association" and "standard-setting organization,"[10] the Commission should "permit any generally recognized industry association or standard-setting body to produce a CALEA standard."[11] SBC agrees with the DOJ that the Commission should not limit the definition of "industry association" or "standard-setting organization" to a fixed list of entities or to entities recognized by a particular organization or agency such as the American National Standards Institute ("ANSI"). SBC also concurs with DOJ's recognition that standards bodies often are, and should be, limited to a particular segment of the telecommunications industry. That being true, the Commission should not hold one segment of the industry to a particular standard that was created for another segment of the industry. And the Commission must recognize that although one segment of the industry may be able to easily become CALEA-compliant another may have difficulty achieving compliance because of differences in the technologies they use and the services they offer.

Further, the DOJ set forth three criteria that it believes an organization should meet in order to be considered a valid industry association or standard-setting organization: the organization (1) should be generally recognized as being representative of a segment of the industry and have technical expertise, (2) should expressly state in the text of its published standard that the purpose is to guide CALEA compliance for a particular segment of carriers, and (3) must maintain an adequate record of its proceedings, including the technical capabilities

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[9] SBC Comments at 16-18.

[10] *CALEA NPRM* at ¶80.

[11] DOJ Comments at 54.

considered but rejected.[12] SBC does not disagree with the spirit of these criteria, however, SBC feels strongly that Commission pre-approval or disapproval of standards bodies for CALEA purposes is inappropriate and can potentially be used by law enforcement or others to circumvent the CALEA standards deficiency process. The CALEA standards deficiency process is designed for Commission evaluation of the adequacy of a particular standard, not of the merits of the organization that establishes the standard.

III. THE COMMISSION MUST GIVE THE COMMUNICATIONS INDUSTRY A REASONABLE AMOUNT OF TIME TO DEVELOP AND IMPLEMENT STANDARDS

The DOJ recommends that the Commission modify its 90-day compliance proposal by first requiring carriers to "immediately comply with CALEA once a coverage determination is made" (i.e. begin developing CALEA solutions within the 90-day period following the Commission Order) and then adopting a separate deployment deadline which would require carriers to "deploy and make available CALEA-compliant intercept solutions to law enforcement" within 12 months of the Commission's coverage determination.[13] This is simply not enough time. As discussed above in section II, the industry needs to work collaboratively to establish appropriate definitions for CALEA section 103 requirements and standards bodies need to develop appropriate standards for the various segments of the telecommunications industry. While these activities take time, they are vital to ensure CALEA requirements are applied correctly and law enforcement obtains the surveillance capabilities it is lawfully entitled to without unduly burdening the communications industry or retarding innovation in the development of networks and services. And while SBC does not oppose the Commission setting ***reasonable*** deadlines for compliance if the Commission determines that a given service is

[12] DOJ Comments at 55-56.

[13] *Id.* at 57.

subject to CALEA, the Commission should look to industry experts to determine what is reasonable. As Motorola points out, "[p]remature forced development of technical CALEA solutions will likely result in solutions that are unwise, inefficient, less effective, and perhaps soon obsolete."[14] The Commission should take care not to establish compliance deadlines that value expediency over quality.

IV. THE COMMISSION MUST NOT LIMIT THE EXTENSION PROCESS TO EQUIPMENT, FACILITIES, AND SERVICES INSTALLED OR DEPLOYED PRIOR TO OCTOBER 25, 1998

The DOJ requests that the Commission "preclude any carrier offering packet-mode services from seeking a further extension under section 107(c) unless the carrier can demonstrate that it installed or deployed its equipment or facilities used to provide packet-mode services before October 25, 1998."[15] While section 107(c) of CALEA specifically addresses equipment and facilities installed or deployed prior to the effective date of CALEA section 103 (October 25, 1998), nothing in that section remotely suggests that the Commission is otherwise barred from granting extensions for equipment and facilities deployed after the effective date of CALEA. It would be entirely consistent with the Commission's overarching authority under the Communications Act to implement CALEA,[16] and in keeping with Congress's recognition that extensions for CALEA implementation will be necessary in some circumstances, for the Commission to conclude that the existing extension process should also apply to equipment and facilities installed or deployed after October 25, 1998, if the equipment/facilities in question were not subject to CALEA at the time of deployment. Broadband and VoIP services were in their very earliest stages of deployment in 1998 and, as apparent from the very existence of the

[14] Motorola Comments at 17.

[15] DOJ Comments at 64-65.

[16] 47 U.S.C. §229(a).

CALEA NPRM in 2004, it is clear that CALEA did not apply to these services at the time of deployment. Accordingly, the Commission should conclude that the existing extension process applies to broadband and VoIP services.

If the Commission decides as a result of this rulemaking that broadband and VoIP services are subject to CALEA, it must give providers a reasonable amount of time to comply with CALEA requirements (as stated in more detail in section III of these reply comments) and must allow for the inevitability that not all providers will be able to comply within that timeframe. The extension process is the easiest and most effective way for the Commission to deal with this inevitability. Absent recourse to the extension process, the Commission could be faced with numerous section 109 petitions accurately stating that CALEA compliance is not "reasonably achievable" for some service providers because they cannot comply within the unreasonable compliance timeframe set by the Commission.

Nextel recognizes this problem when it observes, "[w]ithout reasonable extensions, enforcement may become the routine, and ultimately courts will decide whether solutions were reasonably achievable in a timely manner. Nextel fails to see how such an approach furthers CALEA or the availability of solutions."[17] As Nextel states, "extensions based on reasonable criteria, including law enforcement needs and timing, as well as carrier cost and efficiency, are the better approach."[18] SBC agrees and pointed out in its comments that, "broadband and VoIP service providers should be afforded the same opportunity for extension that other providers were afforded [in the initial CALEA implementation] in order to work with the industry and law

[17] Nextel Comments at 12.

[18] *Id*.

enforcement to develop standards that will ensure compliance with CALEA without jeopardizing networks or the evolution of new technology."[19]

V. THE COMMISSION SHOULD REJECT LAW ENFORCEMENT'S SELF-SERVING AND LEGALLY SUSPECT ARGUMENTS REGARDING COST RECOVERY

In its comments, the DOJ repeatedly stresses its view that "Section 109(b) of CALEA places financial responsibility for CALEA implementation costs for equipment, facilities, and services installed or deployed *after* January 1, 1995, on *carriers*."[20] It further goes on to state that the "pronouncement in section 109(b) of CALEA makes clear that carriers bear financial responsibility for CALEA development, implementation, and compliance costs for post-January 1, 1995 equipment and facilities."[21] SBC can find no such pronouncement in the CALEA statute. Indeed, the only cost-recovery references in CALEA provide for *government-funded* recovery of CALEA costs. Specifically, section 109(b) of CALEA provides for the option of government-funded cost recovery for those post-January 1, 1995 services where CALEA compliance is not reasonably achievable. Nowhere does CALEA specifically state that the cost of CALEA compliance must be borne by the carriers.

As SBC and others explained in their comments, the starting place for any discussion of cost recovery is OCCSSA, not CALEA. Section 2518(4) of OCCSSA specifically states, "[a]ny provider of wire or electronic communication service, landlord, or custodian or other person furnishing such facilities or technical assistance [to law enforcement] *shall* be compensated therefore by the applicant [law enforcement] for reasonable expenses incurred in providing such

[19] SBC Comments at 22.

[20] DOJ Comments at 83. (emphasis in original text)

[21] *Id*.

facilities or assistance."[22] As TIA points out, OCCSSA "plainly requires recovery for expenses incurred in providing 'facilities' as well as 'assistance.'"[23] Thus, since 1968 (when OCCSSA was enacted), law enforcement has had a statutory obligation to compensate carriers for the reasonable expenses of facilities used in providing surveillance to law enforcement.

Accordingly, the DOJ's claim that "distinguishing between CALEA capital costs and CALEA intercept costs is critical"[24] is a misguided attempt to circumvent OCCSSA's mandate that law enforcement compensate carriers for *both* facilities and assistance costs regardless of whether those costs include capital costs. The DOJ wants the Commission to believe that, under CALEA, capital costs are to be borne solely by carriers, while law enforcement should have a minimal obligation to pay for certain limited intercept costs. But nothing in CALEA (or OCCSSA) remotely suggests that DOJ's assertion is correct. First, as discussed above, the plain text of CALEA provides only for government-funded cost recovery. Second, there is no such things as "CALEA capital costs" and "CALEA intercept costs." Neither of those terms appear anywhere in CALEA. In fact, the notion of a "CALEA intercept cost" is a non-sequitur. CALEA does not require or authorize carriers to perform intercepts – rather, that authority comes from OCCSSA, which as discussed above requires law enforcement to pay for both assistance and facilities provided by carriers for surveillance.

As many commenters point out, DOJ's self-serving interpretation of CALEA is simply inconsistent with the plain language of both CALEA and OCCSSA. According to Nextel, "CALEA did not change the law with regard to cost recovery under state and federal surveillance

[22] 18 U.S.C. §2518(4)(e).

[23] TIA Comments at 23.

[24] DOJ Comments at 87.

statutes."[25] As Motorola highlights in its comments, there is nothing "in CALEA or its legislative history to support a view that Congress intended to amend or alter the historic rights and abilities of carriers to charge such fees under the wiretap laws."[26] And the United States Internet Service Provider Association (USISPA) aptly notes that the "allocation in CALEA of a specific fund of $500 million for reimbursement of CALEA compliance costs did not abrogate the existing authority for carriers to recover their intercept costs under [OCCSSA]."[27]

Undaunted by the plain language of OCCSSA and CALEA, the DOJ also advances a policy-oriented argument on cost recovery, claiming that "allowing CALEA capital costs to be included in carriers' CALEA intercept provisioning charges constitutes an improper shifting of the CALEA-allocated cost burden from industry to law enforcement not authorized or contemplated by CALEA."[28] But the DOJ's concern about cost shifting is based on a false premise. CALEA simply does not place the burden of CALEA-based upgrades on carriers. And, while CALEA does clearly delineate when the Attorney General is authorized to pay for certain CALEA-related costs, it never suggests that carriers must bear the burden of CALEA-related costs when the Attorney General chooses not to pay for those costs. To the contrary, OCCSSA places the burden squarely on law enforcement to pay for costs associated with its surveillance activities. The fact that Congress later enacted CALEA to establish specific requirements for carriers in assisting law enforcement with surveillance activities does not mean that Congress intended to abolish carriers' rights to charge law enforcement for those activities.

[25] Nextel Comments at 4.

[26] Motorola Comments at 24.

[27] USISPA Comments at 37.

[28] DOJ Comments at 89-90.

When Congress enacted CALEA, it understood that it was asking for immediate, substantial, costly upgrades to carriers' facilities and it made special provisions to provide more expeditious *government-funded* reimbursement for some of those specific upgrades. But Congress did not intend for CALEA to absolve law enforcement agencies from their obligation under OCCSSA to pay for the facilities and assistance provided for their surveillance needs. As TIA observes, "the immediate beneficiaries of new CALEA features are law enforcement agencies, who are also important participants in deciding how to implement CALEA…[o]nly in matching the beneficiary and the cost will efficient, reasonable decisions be made about how to implement CALEA."[29] Matching the beneficiary and the cost is precisely what Congress accomplished under OCCSSA and CALEA, and the Commission has no authority to re-write those laws to achieve a different result.

VI. CONCLUSION

For the foregoing reasons, the Commission should carefully examine whether broadband and VoIP services truly fit into the current CALEA statute and make such a determination only if the Commission is confident that it will withstand judicial scrutiny. If the Commission does choose to make such a determination, it should seek the counsel of an industry forum to ascertain the scope of applicability for each service and should leave the technical aspects of CALEA to the standards bodies. Providers should be allowed ample time to implement solutions and should not be denied the reasonable cost recovery allowed under OCCSSA for the necessary changes required by the new standards.

[29] TIA Comments at 23.

Respectfully Submitted,

/s/ Jennifer Byrd

Jennifer Byrd
Gary L. Phillips
Paul K. Mancini

SBC Communications Inc.
1401 I Street NW 11th Floor
Washington, D.C. 20005
Phone: 202-326-8904
Facsimile: 202-408-8745

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